

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

J. Roberts
Proc II

GAO 00040

9101

FILE: B-193228

DATE: February 9, 1979

MATTER OF: Mayfair Construction Company

[Protest Alleging that Low Bid was Submitted Late]

DIGEST:

Although GAO will consider protests involving subcontract awards by Government prime contractors under limited circumstances as delineated in Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166, instant protest will not be considered where selection of subcontractor was choice of prime contractor without Government agency involvement and facts do not substantiate claim that prime contractor was contracting "for" the Government.

DLG-00870
Mayfair Construction Company protests the award DLG-00869 of a construction contract by Martin Marietta Corporation to Bold Brothers Construction Company under a Martin Marietta Invitation for Bids (IFB). It is alleged that the Bold Brothers bid was submitted late.

AGC00036
The construction work consists of alterations to the Vertical Assembly Building at the National Aeronautics and Space Administration's (NASA) Michoud Assembly Facility. Martin Marietta holds a NASA contract for the manufacture, assembly, and testing of the external tank for the Space Shuttle. Under a separate no-fee facilities contract, NASA furnished Martin Marietta a portion of the Vertical Assembly Building at Michoud to be altered as determined by Martin Marietta in furtherance of its performance under the Space Shuttle contract.

As a basis for its protest, Mayfair alleges that the Bold Brothers low bid in response to the Martin Marietta IFB was submitted a few minutes after the closing time for submission of bids, thus making it a late bid. Mayfair argues that the Federal norm should be applied

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to disqualify the late bid because the prime contractor was procuring "for" the Government. Therefore Mayfair asserts that it, as the lowest timely bidder, is entitled to award.

Because Mayfair's protest concerns the award of a subcontract by a prime Government contractor, a threshold question is raised as to whether our Office should consider the protest. In Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166, our Office held that we would entertain protests concerning the award of subcontracts by prime contractors only under certain clearly delineated circumstances. Consideration is limited to five categories of cases: (1) where the prime contractor is acting as a purchasing agent of the Government; (2) where the Government so actively participates in the subcontractor selection process as to effectively cause or control the selection, or significantly limit subcontractor award sources; (3) where fraud or bad faith is shown in the Government approval of the subcontract award; (4) where the subcontract award is "for" an agency of the Federal Government; and (5) where questions concerning subcontract awards are submitted by a Federal agency entitled to advance decisions from our Office.

Mayfair argues that Martin Marietta as "the operator of NASA's Michoud Assembly Facility" was contracting for NASA and therefore all Federal procurement rules, applicable to NASA, especially those concerning late bids, should also apply to Martin Marietta. In this regard, Mayfair alleges that the Martin Marietta IFB contained a statement to the effect that "NASA Procurement Regulations would be applicable to the contract award."

NASA maintains that Mayfair's basic premise that Martin Marietta operates the Michoud Assembly Facility for the Government is incorrect. NASA offers the following:

" * * * Martin is not operating a plant for NASA; rather it is merely using Government-furnished property in the form of the Vertical Assembly Building in order to perform the

external tank contract more economically. Moreover, Martin is just one of several contractors using various facilities and buildings at Michoud to perform their contracts. Other features which distinguish this from a GOCO [Government-owned, contractor-operated] plant include the fact that there is a separate maintenance contractor * * * for the performance of grounds maintenance, certain types of building maintenance (but not building alteration), and certain types of equipment maintenance. Further, fire and security protection is furnished by * * * and printing and reproduction services are furnished by * * *.

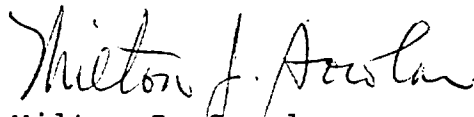
"As for management of the facility, none of these contractors is a management contractor * * * NASA, through Civil Service personnel located at the facility, performs the management function and is responsible for assigning space and providing facilities to other Government tenants located at Michoud."

NASA claims it was not involved in Martin Marietta's subcontract procurement, noting that Martin Marietta "through its own purchasing system solicited bids and awarded the subcontract without any direction or influence from NASA as to which subcontractor should be selected." NASA denies that the Martin Marietta IFB contained any statement that would make NASA procurement regulations applicable to the subcontract award as Mayfair initially alleged. In this regard, Mayfair does not contest NASA's reply. Moreover, even if Martin Marietta planned to use NASA procedures in awarding its subcontracts, that, without more, would not justify our review of this subcontract award.

In our view, the facts in this case indicate that NASA neither participated in the selection of Martin Marietta's subcontractor, nor was the Martin Marietta subcontract award one which was "for" the Government as contemplated by Optimum Systems, Incorporated - Subcontract Protest, supra. This, therefore, is not the

type of subcontract case where we will assume jurisdiction. Pen Foam Insulation Co., B-192764, September 26, 1978, 78-2 CPD 233; Magnetic Engineering Associates, Inc., B-191377, June 21, 1978, 78-1 CPD 448; Fein-Marquardt Associates, Inc., B-189942, February 1, 1978, 78-1 CPD 93.

As such, we must decline to consider Mayfair's protest on the merits.


Milton J. Socolar
General Counsel